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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

EDDIE LEON SCHUYLER,

Defendant and Appellant.

C062510

(Super. Ct. No. 08F1575)

Defendant Eddie Leon Schuyler pled guilty to first degree burglary (Pen. Code, § 459),¹ and admitted two prior strike convictions (§§ 1170.12, 667, subd. (a)), along with three prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to 36 years to life.²

¹ Undesignated statutory references are to the Penal Code.

² The recent amendments to section 4019 do not operate to modify defendant's entitlement to presentence conduct credit, as he was committed for a serious and violent felony and had prior convictions for a serious or violent felony. (§§ 4019, former subds. (b)(2) & (c)(2) [as amended by Stats. 2009, 3d Ex. Sess.

On appeal, defendant contends the court erred in limiting his presentence credits pursuant to section 2933.1. The Attorney General argues the judgment should be modified to impose two one-year prior prison term enhancements stayed by the trial court. We shall modify the judgment to strike two of the prior prison term enhancements, and affirm the judgment as modified.

FACTS

Since defendant was convicted by a guilty plea, the facts of his crime are taken from the probation report.

One evening in February 2008, Kathleen Curtin came home and went to her bedroom, where she found her neighbor, defendant, sitting in the open closet. Defendant went to the open doorway to keep her from leaving. Curtin asked defendant what he was doing. He replied: "I'm infatuated with you, I want you to know."

Curtin asked defendant to leave three or four times; he told her to sit on the bed and he would leave. Defendant left after Curtin told him she was very uncomfortable, and asked what his landlord would say. The incident lasted about 15 minutes.

Curtin determined that a roll of duct tape and a pair of underwear had been moved from her laundry room to a small room next to her bedroom. She also found 20 feet of rope tied to one

2009-2010, ch. 28, § 50], 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

end of the bed frame, and a syringe loaded with a red substance in her closet. Officers found evidence of forced entry by the kitchen window.

DISCUSSION

I

Section 2933.1 limits presentence conduct credit to 15 percent of the actual period of confinement for defendants convicted of a violent felony, as defined in section 667.5, subdivision (c). (§ 2933.1, subds. (a) & (c).) Pursuant to section 667.5, subdivision (c)(21), "[a]ny burglary of the first degree, as defined in subdivision (a) of section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the location during the commission of the burglary" is a violent felony.

Defendant pled guilty to first degree burglary in count 1 of the information. Count 1 alleged: "On or about the 14th day of February, 2008, [defendant] willfully and unlawfully entered an inhabited dwelling house inhabited portion of a building occupied by KATHLEEN CURTIN, with the intent to commit larceny and any felony." The information further alleged the burglary was a serious felony within the meaning of section 1192.7, subdivision (c)(18), and a violent felony within the meaning of section 667.5, subdivision (c)(21). The change of plea form signed by defendant did not mention that the burglary was a

violent felony, and the issue was not addressed when the court took defendant's guilty plea.

Sentencing defendant on his first degree burglary conviction, the trial court applied section 2933.1 and awarded defendant 473 days' credit for local time served and 70 days' conduct credit. Defendant contends section 2933.1 did not apply to limit his conduct credits because his guilty plea did not admit that the burglary was a violent felony as defined in section 667.5, subdivision (c) (21). We disagree.

The designation of the burglary offense as a violent felony was not part of defendant's plea because it was neither an element of the crime nor an enhancement which must be found by the trier of fact. For example, determining whether a crime is a violent or serious felony under the Three Strikes law is "the type of inquiry traditionally performed by judges as part of the sentencing function." (*People v. Kelii* (1999) 21 Cal.4th 452, 456.) Likewise, when applying section 2933.1, "determining whether a defendant's current conviction for first degree burglary is a violent felony is properly part of the trial court's traditional sentencing function." (*People v. Garcia* (2004) 121 Cal.App.4th 271, 279.)

The pleading and proof requirements in section 667.5, subdivision (c) (21), do not mandate a different result. "The pleading and proof requirements of section 667.5, subdivision (c), safeguard the defendant's right to notice of the facts the

prosecution intends to prove as well as the due process requirement that the People actually prove the facts required either for imposing an increased penalty or for making decisions regarding the severity of the sentence within the prescribed range. [Citations.] As with other sentencing facts, however, proof that a first degree burglary falls within section 667.5, subdivision (c) (21), is properly presented to the sentencing court." (*People v. Garcia, supra*, 121 Cal.App.4th at p. 279.)

Defendant next asserts there was insufficient evidence for the sentencing court to find the burglary was a violent felony as the recitation of facts in the probation report was inadmissible hearsay. This argument also fails.

A guilty plea admits every element of the charged offenses. (*People v. Wallace* (2004) 33 Cal.4th 738, 749.) As related above, the charge stated defendant committed the burglary in a building occupied by Curtin. In taking defendant's plea, the court declared count 1 is "a first-degree burglary allegation, Ms. Kathleen Curtin [*sic*] being the owner, and apparently the individual present on the 14th at that residence." Defendant entered a guilty plea to this charge, which is substantial evidence that the premises was occupied when defendant committed the burglary.

The sentencing hearing provided additional support for the finding. Defendant submitted a letter to the court asking for leniency, stating: "To Kathleen Curtin I want to say that I am

very very sorry and though in my rite [sic] frame of mind I would of [sic] never intended her harm, I know I must have frightened her. I violated her home and there is no excuse for that." In addition, Curtin gave a statement to the court relating the facts of the offense, including defendant's presence in her bedroom.

Curtin was inside the house when defendant burglarized her house, rendering his burglary conviction a violent felony under section 667.5, subdivision (c)(21). The court properly limited his presentence conduct credits under section 2933.1.

II

Defendant admitted three prior prison term allegations, based on a 1986 conviction for voluntary manslaughter, a 2002 conviction for criminal threats, and a 2007 conviction for second degree burglary. He also admitted two serious felony allegations for the voluntary manslaughter and criminal threat convictions. The court stayed sentence for two of the three prior prison term allegations.

The Attorney General argues the court may not stay a prior prison term enhancement, while defendant claims the enhancements must be stricken. Defendant is correct.

"Section 667.5(b) provides for an enhancement of the prison term for a new offense of one year for each 'prior separate prison term served for any felony,' with an exception not applicable here Once the prior prison term is found true

within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.)

In *People v. Jones* (1993) 5 Cal.4th 1142 at pages 1144-1145, the California Supreme Court determined that when the electorate enacted what is now section 667, subdivision (a)(1), it did not intend for a prison sentence to be enhanced for both a prior conviction and for a prison term imposed on the conviction. The *Jones* court found that “when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply.” (*Jones, supra*, at p. 1150.)

Rather than staying sentence, the court should have stricken two of the prior prison term allegations, since defendant admitted section 667, subdivision (a), allegations as to those offenses. We shall strike two of the prior prison term allegations.

DISPOSITION

The judgment is modified to strike two of the prior prison term allegations and the sentences imposed on them. (Pen. Code, § 667.5, subd. (b).) As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of

judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SIMS, J.

We concur:

SCOTLAND, Acting P. J.*

BUTZ, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.